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(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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In re:

Marine Shale Processors, Inc.

Permit No. LA0067351  
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NPDES Appeal No. 91-22

[Decided September 12, 1994]

***FINAL DECISION AND ORDER***

***Before Environmental Appeals Judges Nancy B. Firestone and Ronald  
L. McCallum.***

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# MARINE SHALE PROCESSORS, INC.

NPDES Appeal No. 91-22

## FINAL DECISION AND ORDER

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Decided September 12, 1994

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### Syllabus

Marine Shale Processors ("MSP") has filed a petition for review of the denial of its evidentiary hearing request by U.S. EPA Region VI on matters relating to the Region's termination of MSP's National Pollutant Discharge Elimination System ("NPDES") permit and the denial of MSP's application for renewal and modification of that permit.

Prior to oral argument in this case, the basis for the Region's permit termination decision was not entirely clear. That is, the Region had originally proposed to terminate the permit on the grounds that MSP had failed to reveal all relevant facts during the permit issuance process or to comply with the permit's notification requirements. *See* 40 C.F.R. § 122.64(a). In particular, the Region concluded that MSP failed to notify the Region that MSP had begun receiving and processing hazardous waste prior to issuance of its NPDES permit. In response to comments on the proposed termination decision, however, the Region indicated that the termination decision was also based on the Region's conclusion that MSP had acted in bad faith and had intentionally deceived the Agency regarding the true nature of its activities. At oral argument, counsel for the Region made clear that the decision to terminate the permit, rather than take less severe actions such as modification or revocation and reissuance, was based on the Region's belief that MSP had acted in bad faith.

MSP vigorously denies any intention to deceive the Region. In particular, MSP asserts that it kept the Region's hazardous waste personnel fully informed of its activities. MSP further states that it acted openly and did not seek to avoid any of its NPDES obligations.

Held: Given the basis for the Region's termination decision, the issue of whether or not MSP intentionally mislead the Region is a material issue in that it could affect the outcome of the present proceeding. Moreover, MSP has presented evidence which, if true, would allow a reasonable fact finder to find that the Region erred in concluding that MSP acted in bad faith. MSP has therefore raised a material factual issue warranting an evidentiary hearing. This matter is therefore remanded.

On remand, the Region is ordered to conduct an evidentiary hearing on whether MSP intentionally misrepresented the nature of its hazardous waste-related activities and, therefore, whether the Region's decision to terminate the permit and to deny MSP's request for modification and renewal of that permit was supported by the administrative record.

***Before Environmental Appeals Judges Nancy B. Firestone, and Ronald L. McCallum.*<sup>1</sup>**

### ***Opinion of the Board by Judge McCallum:***

Marine Shale Processors, Inc. ("MSP") seeks review of the denial of its evidentiary hearing request by U.S. EPA Region VI on matters relating to the termination of MSP's National Pollutant Discharge Elimination System ("NPDES") permit and the denial of MSP's application for renewal and modification of that permit. For the reasons stated below, this matter is remanded to Region VI so that an evidentiary hearing can be conducted.

### I. BACKGROUND

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Environmental Appeals Judge Edward E. Reich did not participate in this decision.

On February 5, 1985, MSP submitted an application to the Region VI Water Permits Branch for authorization to discharge effluent into Bayou Boeuf from its facility near Amelia, Louisiana. The application stated that MSP planned to incinerate only non-hazardous oil field wastes. *See* Administrative Record ("AR"), at A-02. On May 24, 1986, in reliance on this representation, the Region prepared and gave public notice of a draft permit indicating that the facility would be treating non-hazardous wastes from fuel drilling operations. AR, at A-09. Except for a telephone call from MSP's Vice President and General Counsel to the Chief of the NPDES Permits Branch to request the addition of a stormwater limitation,<sup>2</sup> no public comments were received on the draft permit. The final permit was issued on July 11, 1986, with an effective date of July 12, 1986, and an expiration date of July 11, 1991. AR, at A-12.

Shortly after MSP filed its NPDES permit application but before issuance of the final permit MSP began receiving and processing hazardous wastes. It is undisputed that MSP did not seek to amend its permit application at that time. In addition, it is undisputed that MSP did not directly notify Region VI's NPDES permitting staff of this fact during the permit issuance process. MSP did, however, submit a notification of hazardous waste activity to the Region VI Waste Management Division prior to issuance of the NPDES permit. Region's Response to Petition for Review, at 2; AR, at B-08 exhs. A & D. In addition, because the public notice indicated that the Region had consulted with the Louisiana Department of Environmental Quality ("LDEQ") during the permit issuance process, and because the LDEQ was aware that MSP had begun receiving hazardous waste,<sup>3</sup> MSP states that it had a "justified belief" that the Region VI NPDES permitting staff was aware of MSP's hazardous waste operations when the permit was being prepared. Appeal, at 31.

By letter dated February 27, 1987, approximately eight months after receiving its final NPDES permit, MSP filed with the Region VI NPDES staff an application for modification of the permit to reflect, among other things, the fact that MSP was receiving hazardous waste. Under the terms of MSP's permit, and as provided for in 40 C.F.R. § 122.42(a), MSP was required to notify the Agency as soon as MSP knew or had reason to believe:

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<sup>2</sup> *See* Administrative Record (AR), at A-11, E-22.

<sup>3</sup> On July 29, 1986, the LDEQ issued a compliance order stating, among other things, that MSP had been discharging hazardous wastes in violation of the State issued water discharge permit. *See* Exh. 1B to Petition for Review.

a. That any activity has occurred or will occur which would result in the discharge, *in a routine or frequent basis*, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the "notification levels" described in 40 C.F.R. 122.42(a)(1) [48 FR 14153, April 1, 1983, as amended at 49 FR 38046, September 26, 1984].

b. That any activity has occurred or will occur which would result in any discharge, *on a non-routine or infrequent basis*, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the "notification levels" described in 40 C.F.R. 122.42(a)(2) [48 FR 14153, April 1, 1983, as amended at 49 FR 38046, September 26, 1984].

Permit Condition II.D.8 (emphasis added) (brackets in original).

Thereafter, for nearly four years, Region VI and MSP actively engaged in negotiations and dialogue with each other regarding the terms of a modified NPDES permit. On September 3, 1988, the Region gave public notice of a draft permit modification. AR, at J-23. The Region then prepared, but never published, another draft permit that included biomonitoring requirements and established additional effluent discharge parameters. Request of Marine Shale Processors, Inc. for Evidentiary Hearing ("Evidentiary Hearing Request"), at 3. On March 24, 1990, Region VI published notice of another draft permit modification containing additional discharge limitations for priority pollutants associated with MSP's processes. *Id.* at 3. The Region held a public hearing on this draft modification on July 18, 1990, during which several commenters alleged that MSP had not submitted complete and accurate information regarding MSP's operations in the original permit application. *See* Public Notice of Proposed Action, at 4 (AR, at B-08).

After considering comments submitted on the proposed permit modification and compiling information from other offices regarding MSP's handling and processing of hazardous waste, the Region issued a Public Notice of Proposed Action, dated March 1, 1991, proposing to terminate MSP's permit pursuant to 40 C.F.R. § 122.64(a), <sup>4</sup> and deny the request to renew or modify that

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<sup>4</sup>

That section states, in pertinent part:

(continued...)

permit. The proposed termination was based on two grounds. First, the Region concluded that MSP, by failing to directly inform the NPDES permitting staff that MSP was handling hazardous waste prior to issuance of the final permit, had not disclosed all relevant facts during the permit issuance process, a cause for permit termination under 40 C.F.R. § 122.64(a)(2). *See* Notice of Proposed Action, at 9-10. In particular, the Region stated:

MSP has exhibited a consistent pattern of receiving hazardous waste and/or conducting activities for receiving hazardous waste up to the date of ending of the comment period. The Water Permits Branch should have been informed of these relevant facts. Since the Water Permits Branch was not informed, a permit was proposed and issued based on inaccurate and misleading documents - the existing permit is for the treatment of non-hazardous oil field wastes - as contrasted to a permit which should have been drafted and placed in effect for a hazardous waste incineration facility which was actually the operation.

\* \* \* \* \*

Therefore, it is determined that MSP has caused the Environmental Protection Agency to issue [the permit] based on inaccurate documents and that MSP has violated 40 C.F.R. 122.64(a)(2) in that MSP did not correct these documents during the issuance process for the permit effective July 12, 1986. This is cause for termination of [the permit] and denial of the renewal application for that permit pursuant to 40 C.F.R. 122.64(a)(2).

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<sup>4</sup>(...continued)

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

(1) Noncompliance by the permittee with any condition of the permit; [and]

(2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; \* \* \*.

40 C.F.R. § 122.64(a).

*Id.* Second, the Region found that MSP had failed to timely inform NPDES permitting staff of MSP's handling and processing of hazardous waste in violation of the permit's reporting requirements, a cause for termination under 40 C.F.R. § 122.64(a)(1). *Id.* at 10. In response to these two grounds for terminating its permit, MSP submitted extensive comments and supporting documents opposing the proposed action.<sup>5</sup> Comments were also received from several individuals and public interest groups, including the Atchafalaya Delta Society, the Louisiana Environmental Action Network, and South Louisiana Against Pollution. Separately, on January 18, 1991, MSP had submitted a timely application for renewal of its NPDES permit, which had an expiration date of July 11, 1991.

On July 6, 1991, the Region issued a public notice of its final decision terminating the permit and denying MSP's application for renewal of that permit.<sup>6</sup> AR, at F-01. The Region also responded to comments received on the proposed termination.<sup>7</sup> In responding to comments, the Region, for the first time, raised

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<sup>5</sup> MSP submitted five volumes of comments in support of its assertion that termination of the permit and the denial of MSP's renewal request, as proposed by the Region, would be arbitrary, capricious, and an abuse of discretion. Essentially, MSP asserted that 1) MSP had properly and timely notified the Region of MSP's hazardous waste activities prior to issuance of the final permit; 2) Region VI's NPDES permitting staff had actual knowledge that MSP had begun receiving hazardous waste prior to issuance of the permit; 3) MSP provided the Region with timely notification of MSP's hazardous waste activities in compliance with the permit's reporting requirements; 4) any failure to directly inform Region VI's permitting staff that MSP had begun receiving hazardous waste was not relevant in that MSP did not discharge process area water or process area contaminated stormwater; and 5) the proposed termination constituted a denial of due process in that it was motivated by emotional arguments and political pressures rather than the factual record. *See* Marine Shale's Comments on Proposed Termination and Denial of Renewal, AR, at C-01.

<sup>6</sup> The Region also stated that because of the termination decision, MSP's modification request will become moot because there will no longer be a permit to modify. The Region therefore took no further action on the modification request. *See* Response to Comments, at 8.

<sup>7</sup> Although the Region conceded that MSP informed individuals in the Region VI Hazardous Waste Division that MSP had begun receiving hazardous waste, the Region stated that "[u]nless a specific situation suggests a particular need for interdivisional coordination, those organizational units maintain separate files and do not inform each other of routine notifications they receive from the regulated community." Response to Comments, at 9. Moreover, as the letter accompanying the draft permit specified that any comments were to be directed to the NPDES Water Permits Branch, the Region stated that "MSP may not credibly claim it thought communications with other EPA offices or the LDEQ would be noted by the Agency's NPDES permitting staff." *Id.* In response to MSP's assertion that the termination was the result of emotional arguments and political pressures, the Region stated:

EPA does not doubt that public emotions run deep whenever actions involving MSP are at issue. MSP has an extremely poor history of compliance with State and Federal laws protecting the environment \* \* \*. Under such circumstances,

(continued...)

additional charges questioning MSP's credibility and truthfulness. Whereas the proposed termination decision expressed no views on whether MSP's alleged failure to provide accurate and timely information regarding its hazardous waste activities was the result of benign neglect or active deception,<sup>8</sup> the final decision was unrestrained in proclaiming that the information was missing because of deception and bad faith on the part of MSP during the permit issuance process. According to the Region, MSP intentionally and materially misled the Agency, and "set out to hoodwink EPA and indeed hoodwinked it longer than many would consider reasonable." Response to comments, at 17. The Region declared that MSP "obtain[ed] its original permit under false pretenses \* \* \*." *Id.* at 19. Further, the Region stated that many of MSP's comments on the proposed termination were false and misleading, *id.* at 2, and that "MSP obtained its 1986 NPDES permit through constructive fraud, willfully failing to disclose facts it knew were material to EPA's decision to issue the permit. Allowing MSP to continue reaping the benefits of its fraudulently obtained permit would disserve the public interest." *Id.* at 19.<sup>9</sup>

On July 31, 1991, MSP submitted a request for an evidentiary hearing. AR, at G-01. Among other things, the request stated that MSP was entitled to a hearing to respond to the Region's statements regarding MSP's alleged lack of truthfulness and credibility. *See* Evidentiary Hearing Request, at 23. By letter dated September 19, 1991, the Region denied the request on the grounds that MSP failed to raise any disputed issues of material fact. *See* Letter from Robert E. Layton Jr., P.E., Regional Administrator, to Joseph E. LeBlanc, Jr., Esquire ("Denial"), AR, at H-01. Specifically, the Region concluded that, in addition to

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<sup>7</sup>(...continued)

public attention and indignation may be anticipated. Likewise, MSP's competitors and various politicians may support today's decision. Comments on this and previous public notices on regulatory proposals involving MSP may well have been submitted by such persons. The Agency's motive in this matter is, however, purely regulatory.

*Id.* at 6.

<sup>8</sup> *See* Public Notice of Proposed Action, at 9-10.

<sup>9</sup> The Region's response to comments on the termination decision includes the following additional responses relating to MSP's alleged bad faith: 1) the Region agreed with a commenter's statement that MSP's environmental consultant had misrepresented that MSP had obtained all necessary discharge permits in 1985, prior to issuance of the NPDES permit, Response to Comments, at 5; 2) in response to a comment asserting that MSP's competitors with less stringent permit limits continue to obtain permits, the Region stated, in part: "Presumably \* \* \* those competitors have a better record for candor than MSP in their dealings with the Agency." *Id.* at 6; 3) in response to a comment that the termination decision reflected bias, the Region stated that the permit was terminated and the renewal request denied because "MSP obtained its 1986 permit through material misrepresentation \* \* \*." *Id.*

raising several purely legal issues, MSP did not dispute the facts underlying the termination decision, but only the conclusions drawn by EPA "from undisputed evidence in the Agency's already voluminous administrative record and its judgment in deciding these conclusions \* \* \*." Denial, at 1. In apparent reference to its remarks that MSP's comments on the proposed termination were "in large part misrepresentations and half truths apparently intended to confuse or deceive EPA,"<sup>10</sup> the Region stated:

The written comments to which EPA reacted in its final decision are a matter of record and no amount of additional evidence can change them. Nor could such evidence change the Agency's responses, each of which explains the basis for EPA's conclusion. Moreover, EPA's responses to MSP comments were not a necessary footing for its decision to terminate MSP's permit, as demonstrated by the fact that it proposed the termination before receiving MSP's comments. MSP's comments provided additional support for the Agency's decision, but that support was *lagniappe*, not an indispensable decisional basis. Even were it possible to show through additional evidence that EPA erred each time it found an MSP comment misleading and/or false, those errors would thus be harmless to the Agency's decision. Accordingly, MSP is not entitled to an evidentiary hearing to contest EPA's responses.

*Id.* at 6 (emphasis in original).

MSP then filed the petition for review at issue in the present case. At the Board's request, the Region filed a response to the petition for review. MSP then filed a reply to the Region's response which the Board accepted into the administrative record on appeal. The Board heard oral argument in this matter on June 8, 1994.

## II. ANALYSIS

Under the rules governing an NPDES proceeding, there is no appeal as of right from the denial of an evidentiary hearing request. Ordinarily, a petition for review of a denial of an evidentiary hearing request is not granted unless the denial of the request is clearly erroneous or involves an exercise of discretion or policy

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<sup>10</sup> Response to Comments, at 2.



that is important and should therefore be reviewed by the Environmental Appeals Board. 40 C.F.R. § 124.91(a); *In re J & L Specialty Products Corp.*, NPDES Appeal No. 92-22, at 12 (EAB, Feb. 2, 1994). "The Agency's longstanding policy is that NPDES permits should be finally adjudicated at the Regional level, and that the Board's power to review NPDES permit decisions should be exercised only 'sparingly.'" *In re Town of Seabrook, N.H.*, NPDES Appeal Nos. 93-2, 93-3, at 3 (EAB, Sept. 28, 1993) (citing 44 Fed. Reg. 32,887 (June 7, 1979)). The petitioner has the burden of demonstrating that review should be granted. *Id.*

In order to satisfy this burden, and thus show why an evidentiary hearing is required, a petitioner must demonstrate the existence of "material issues of fact" relevant to the permit determination. 40 C.F.R. § 124.75(a)(1).<sup>11</sup> To satisfy this requirement, the evidentiary hearing request must articulate a factual issue that is material, that is, one that might affect the outcome of the proceeding. *Town of Seabrook, supra*, at 11. In addition, the request must demonstrate that there is a genuine dispute between the parties. *In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, at 12-13 (EAB, Aug. 23, 1993). A genuine dispute exists where there is sufficient evidence in the administrative record that would support a finding for *either* party. *Id.* at 13. Thus, in assessing whether Region VI clearly erred in denying MSP's evidentiary hearing request, we must determine whether the request sets forth an issue of fact material to the permit decision and, if so, whether the record evidence on that issue would reasonably support a finding for either Region VI or MSP. *See J & L Specialty Products, supra*, at 14. For the following reasons, we conclude, based on the record before us, including the representations of counsel for the Agency at the June 8, 1994 oral argument, that MSP has met its burden in this regard.

An essential step in deciding whether there are any "material" factual issues in dispute is first to determine the basis for the Region's termination decision. As discussed below, however, the precise basis for this decision was not entirely clear prior to oral argument. As previously stated, Region VI originally proposed to terminate the permit on the grounds that MSP failed to notify the Region of relevant facts during the permit issuance process and failed to comply with the permit's notification provisions. MSP objected to the Region's characterization of the facts and argued in its comments on the proposed termination that the Region had been fully informed of MSP's activities. In responding to these comments, the

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<sup>11</sup> Although this section refers only to the "issuance of the permit," the regulations governing permit termination make clear that 40 C.F.R. Part 124 was intended to apply to permit terminations as well. *See* 40 C.F.R. § 122.64(b) (Termination of permits) ("The Director shall follow the applicable procedures in part 124 or State procedures in terminating any NPDES permit under this section.").

Region's remarks, quoted previously, gave the strong impression that the decision to terminate the permit was not based solely on the belief that there had been a simple failure on MSP's part to disclose relevant facts, but rather on the belief that the failure to disclose was done deliberately by MSP in order to mislead the Region about the true nature of the facility and to gain some type of economic advantage over its competitors. The Region also asserted that MSP's comments themselves were misleading and intended to deceive the Region and therefore provided further support for the decision to terminate the permit. The Region thus clearly indicated its mistrust of MSP, remarking that a "lack of confidence in the permittee's credibility" justified termination of the permit.<sup>12</sup> In its subsequent denial of MSP's evidentiary hearing request, the Region appeared to retreat somewhat from the allegations respecting MSP's lack of credibility. Specifically, in response to MSP's assertion that the Region terminated the permit on the basis of a subjective and unpublished credibility standard, the Region stated that "EPA terminated the permit on the basis of 40 C.F.R. § 122.64(a)(2), \* \* \* a regulation which provides plenty of advance notice of the fact EPA may terminate a permit for failure to disclose relevant facts in permit proceedings." Denial, at 4 n.3. The Region also asserted that its statements in the response to comments regarding MSP's alleged misrepresentations and lack of credibility "were not a necessary footing for its decision to terminate MSP's permit, as demonstrated by the fact that it proposed the termination before receiving MSP's comments." *Id.* at 6. Thus, prior to oral argument, the extent to which MSP's alleged bad faith and lack of credibility entered into the decision to terminate the permit was confused and ambiguous, notwithstanding statements by the Region suggesting that it would have terminated the permit regardless of its mistrust of MSP. At oral argument, however, the Region made clear that the decision to terminate the permit was in fact based on the Region's conclusions regarding MSP's credibility and bad faith. In particular, in response to a question from Judge Firestone inquiring about why the Region chose to terminate rather than modify or revoke and reissue the permit,<sup>13</sup> Counsel for the Region stated, in part:

EPA Region 6 feels that [MSP] tried to hoodwink it during the initial permitting proceeding. EPA Region 6 believes very strongly, and the record certainly suggests at this point, that, in fact, [MSP] did try to, and [MSP] has not come forward with an acceptable explanation.

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<sup>12</sup> Response to Comments, at 10.

<sup>13</sup> See 40 C.F.R. § 122.62(b)(1) (permit may be modified or revoked and reissued where cause exists for termination under § 122.64).

Transcript of Oral Argument ("Transcript"), at 39-40. Counsel for the Region then acknowledged that the termination decision was based on the Region's belief that MSP had acted in bad faith by deliberately concealing relevant information. *Id.* at 40, 49. That acknowledgement by counsel is consistent with the Region's conduct, for the NPDES staff had information throughout the four-year period of negotiating a permit modification that cause existed for terminating the permit through alleging no more than a benign failure on MSP's part to reveal relevant facts on a timely basis regarding its hazardous waste operations.<sup>14</sup> The Region did not, however, take any steps to terminate the permit on those grounds until the very end of that lengthy period. Thus, although the Region may have had those grounds as an alternative and independently sustainable basis upon which to terminate the permit -- and, indeed, the Region seemingly purports to propose termination on no more than that basis -- it seems incontrovertible that the real basis for terminating the permit was the Region's conviction that it had been "hoodwinked." This conclusion is borne out by the words of the final decision, which were subsequently reaffirmed at oral argument by EPA's counsel. We of course are not permitted to shut our eyes to the stated basis for the Region's decision. *Cf. Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 50 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Population Institute v. McPherson*, 797 F.2d 1062, 1072 (D.C. Cir. 1986) ("Judicial review of the propriety of administrative action properly encompasses \* \* \* an examination of the reasoning and rationale actually offered for the particular action being reviewed.").

Given the basis for the Region's termination decision, the issue of whether or not MSP acted in bad faith during the permit issuance process is without question material in that it could affect the outcome of the present proceeding. Under the applicable regulations the decision to terminate a permit for cause is discretionary, with less severe options such as modification, or revocation and reissuance, also being available. *Compare* 40 C.F.R. § 122.64 with § 122.62(b)(1). Since the Region's discretion to choose termination over some less severe sanction was unquestionably influenced by the Region's belief that MSP had

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<sup>14</sup> MSP's permit modification application, which MSP filed with the NPDES staff by letter dated February 27, 1987, reveals that hazardous waste activities were presumably taking place at MSP's facility *prior* to the issuance of its NPDES permit on July 11, 1986. AR, at C-1. Specifically, the letter makes explicit reference to the fact that the facility was granted Interim Status under the hazardous waste regulations on January 2, 1986, and that the original hazardous waste notification was given to EPA and the State on July 19, 1985. *Id.* The letter further notes that MSP never "utilized" the oil field waste aspects of its permit, which, of course, is the core activity reported by MSP in its original NPDES permit application.

committed acts of bad faith,<sup>15</sup> it necessarily follows that the Region's exercise of discretion may have been different if it had not believed that MSP had acted in bad faith. Thus, the issue of whether or not MSP did in fact act in bad faith as alleged by the Region is a material one. Moreover, the issue is "genuine" if the evidence proffered by MSP could reasonably result in a ruling in MSP's favor. That is, based on the evidence in the record before us, could a fact finder reasonably find that while MSP may not have been vigilant with respect to its NPDES responsibilities, MSP was nevertheless open about its waste activities and was not out to "hoodwink" EPA?

In our view the evidence in the record does raise a genuine issue of material fact warranting an evidentiary hearing. The record on appeal shows that MSP informed the Region VI Hazardous Waste Division that MSP had begun handling hazardous waste prior to issuance of the original permit. Appeal at 24-25. In particular, the record contains an acknowledgement from the Region dated August 29, 1985, stating that MSP had filed a notification of hazardous waste activity. AR, at B-08 (Acknowledgment of Notification of Hazardous Waste Activity). In addition, it appears that MSP had discussions with Region VI hazardous waste personnel as well as individuals from the Regional Counsel's Office regarding MSP's activities and plans to receive and burn hazardous waste. *See e.g.*, AR, at B-06, (Letter from William N. Rhea, Chief, Hazardous Waste Compliance Branch, to Glenn Miller, LDEQ Hazardous Waste Division (Nov. 18, 1985) (stating that in an October 3, 1985 meeting with George Eldridge, counsel for MSP, Mr. Eldridge stated that MSP was storing and intended to burn hazardous wastes)); Transcript, at 6-9, 10-11, 14. Further, MSP states that it acted openly and that at no time did it seek to avoid any of its NPDES obligations by intentionally failing to notify Region VI's water office of MSP's waste program. Transcript, at 11. Finally, MSP vigorously denies any intent to mislead or "hoodwink" the Agency or any bad faith in its dealings with the Agency during the permit issuance process. MSP states that its actions both prior to and following issuance of the permit were inconsistent with any attempt to misrepresent its activities or to intentionally deceive the Agency. *See* Appeal, at 25-26; Transcript at 6-7.

The Region does not dispute that MSP informed the Region VI Waste Management Division of MSP's hazardous waste related activities prior to issuance

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<sup>15</sup> At oral argument, the Region's counsel indicated that absent MSP's "bad faith," measures less drastic than termination may have been taken. *See* Transcript, at 39-40. This is not to say that the Region could not elect to terminate a permit where material information has been inadvertently withheld. The Regions clearly have broad discretion in this area. Nonetheless, once a Region has articulated a basis for its decision, it must ensure that its basis is supported by the record.

of the NPDES permit. Region's Response to Petition for Review, at 12, 15. Rather, the Region contends that this is not sufficient to justify an evidentiary hearing. It asserts that "if [MSP] want[s] to say they didn't act in bad faith and get a hearing on it, they have to allege a fact that we're not already aware of or that we don't agree with \* \* \*." Transcript, at 49. In other words, the more important consideration for the Region is MSP's alleged failure to inform the Region VI NPDES staff of its hazardous waste activities. The fact that the hazardous waste staff may have been informed of these activities was apparently considered by the Region to be either irrelevant or immaterial, or both, in deciding whether or not MSP had raised a factual issue that warranted holding an evidentiary hearing on the termination of its permit. There might be some merit to this position if MSP's intent were not an issue in this case. We do not, however, need to decide that question in the present circumstances, for it is clear that MSP's intent is an issue in this case. Moreover, as previously stated, the record evidence points to a genuine factual dispute respecting MSP's intent. Therefore, the dispute must be resolved in an evidentiary hearing to determine whether the Region's stated basis for terminating the permit is sustainable.

Our conclusion that MSP is entitled to an evidentiary hearing on whether it acted in bad faith is buttressed by long settled precedent that disputes involving issues of credibility, motivation, or intent are not appropriate for summary disposition. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge \* \* \*."); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) ("It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised."); *Richardson v. Oldham*, 12 F.3d 1373, 1379 (5th Cir. 1994) (credibility determinations have no place in summary proceedings); *Hackley v. Roudebush*, 520 F.2d 108, 159 (D.C. Cir. 1975) (summary judgment is particularly inappropriate where motivation and credibility are integral components of a material factual conflict); *Cross v. United States*, 336 F.2d 431, 433 (2nd Cir. 1964) (summary proceedings are not appropriate where "the inferences the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions."); 6 Moore's Federal Practice ¶ 56.15[4] (motion for summary judgment must be denied where record discloses a real issue of credibility).<sup>16</sup> As the record on appeal indicates that the final termination decision was based on the Region's

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<sup>16</sup> See *Mayaguez*, *supra*, at 11 (summary judgment standard provides useful guidance for the Board in evaluating whether an evidentiary hearing should be granted).

conclusions regarding MSP's alleged bad faith and lack of credibility, we conclude that an evidentiary hearing is required.<sup>17</sup>

### III. CONCLUSION

The Region has the discretion under 40 C.F.R. § 124.64(a) to terminate a permit where a permittee fails to disclose relevant facts or fails to comply with any permit provision. Although in appropriate circumstances such actions by themselves may justify permit termination, the record on appeal in the present case indicates that the final decision to terminate MSP's NPDES permit was based on certain additional factors, namely, MSP's alleged willful deception, bad faith, and the Region's lack of confidence in MSP's credibility.<sup>18</sup>

Because the record on appeal indicates that MSP has presented evidence which, if true, would allow a reasonable finder of fact to find in MSP's favor, summary disposition of MSP's evidentiary hearing request was inappropriate. Rather, the resolution of a genuine and material factual dispute, which in this case turns on questions of intent and credibility, is properly left for an evidentiary hearing. Therefore, this matter is remanded for purposes of conducting an evidentiary hearing on whether MSP intentionally misrepresented the nature of its activities, and, therefore, whether the Region's decision to terminate the permit and to deny MSP's request for modification and renewal of that permit is supported by the administrative record.<sup>19</sup> In addition, the hearing should address the issue of whether MSP provided the Region with sufficient notice of its hazardous waste activities prior to permit issuance and whether MSP complied with the permit's notification provisions.

We note that more than nine years have passed since MSP filed its initial NPDES permit application and that much has happened in respect to the MSP facility since that time. Consequently, should the Region decide to take other action with respect to MSP's permit, including a new effort to terminate the permit on

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<sup>17</sup> The Region's contention at oral argument that MSP's lack of credibility is self-evident from the record (Transcript, at 47-49) is not supportable. Whether MSP's actions were intended to "hoodwink" the Region into issuing an NPDES permit turns both on the nature of MSP's actions and the Region's understanding of MSP's actions at the time. These issues will require a hearing.

<sup>18</sup> See, e.g., Response to Comments, at 10; Transcript, at 49.

<sup>19</sup> Although 40 C.F.R. § 124.91 contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, oral argument was held and it does not appear as though further briefs on appeal would shed light on the issues to be addressed on remand. See *J & L Specialty Products*, *supra*, at 61 n.65.

other grounds, nothing in this order should be construed as precluding such action.  
*See* 40 C.F.R. § 124.60(b).

So ordered.